

CONTRACTS

INTRODUCTION

A contract is a promise or set of promises of an agreement that is enforceable at law.

- **Objectivity:** an objective approach is essential to contract law. How a reasonable person interprets another's words matters more than their actual intention? Subjective intention is generally not regarded.
- **Freedom to Contract:** contracting parties should be free to agree to whatever agreements they wish and that people should be free to decide to enter into contracts with whomever they wish except illegal contracts. Assumes all players are on an even playing field and all entitled to strengthen their own position (T Ch. 1).
- **Parity of Agreement?** Sometimes you don't get the chance to agree to the terms of the contract in everyday circumstances so the lack of freedom needs to be considered.
- **People Ought to Enter Transactions?** Product of welfare state and done for community and betterment of society

Linked to the laissez faire economic policy which focused on individual autonomy. If you make a contract with a stronger party – too bad.

Fairness doesn't feature so much because of freedom to contract.

- **Illegal Contracts:** those considered to be against morals and public policy it is invalid and unenforceable (to buy drugs, to murder someone etc. both of which would be criminal conspiracy).
- **Implied Prohibition:** when the act is against public policy (sexual morality, conflict of interest, contracts against government or state)
- **Wagering and Gambling:** a contract is null and void but are not prohibited
- **Social Policy:** in *Andrews v Parker* the couple was in a de facto marriage and this was seen to be a deceitful exchange as a result of an immoral association and contract was void.

Useful Theories:

- **Bargain Theory:** results from conjunction of agreement and consideration and delegitimises those where no exchange is present (wills and deeds)
- **Promise Theory:** makes possible to recognise contracts where no agreement and consideration are present. But there are issues on why the law should intervene to protect promises.
- **Reasonable Expectations Theory:** if the reasonable person enforced the contract as valid and common sense then it is

Restraint of Trade: contracts must not limit a party's business (laissez faire system). First see if there is a restraint and then if it is reasonable.

AGREEMENT

2 Types of Agreements:

1. **Bilateral Contract:** A promises B to do something and B promises something in return for and they each provide valuable consideration
2. **Unilateral Contract:** A promises something in return for B doing performing an act where the act itself is the acceptance and consideration of the offer

Woollen Mills outlines the basic offer, acceptance (act) and consideration (must be present) elements for a unilateral contract to be binding.

Australian Woollen Mills v Cth

Facts: Could the government's announcement of Commonwealth subsidy plan in 1946 be an offer and might the plaintiff's purchase of wool be deemed an acceptance? So, can the act of buying wool rather than the promise be consideration?

Issue: Can a unilateral contract form where one party makes an offer to the world and the other accepts by the doing of an act? If so, under what conditions will this be contractual?

Logic: The court ruled that there still has to be a relationship of "quid pro quo" between the promise and the act. The element of consideration is missing in this case because although the woollen mills are making a profit the government is actually not receiving any benefit.

Offer and Acceptance

Offer: An offer is only valid if a reasonable person in the shoes of the offeree would see the situation as an offer.

→ Provision of Information 'Offers'

Seppelt & Sons introduced the idea saying the word 'offer' is not enough, and, a contract that is for such a large sum and might not be enforceable.

Seppelt & Sons Ltd v Commission for Main Roads (1975) 1 BPR 9147

Facts: An email detailed a plaintiff's negotiation with the defendant for the sale of land. It used the word "offer". Can it be deemed a contractual offer, especially on a scale of selling a building and land for the construction of a freeway?

Invitation to Treat

Pharmacy v Boots introduced the idea of an invitation to treat

Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd [1953] 1 QB 401

Facts: There is a law in the UK that says pharmacists have to oversee the sales of drugs. The question in this case was whether the pharmacist had to oversee the sales at the cashier (where they had been seated) or whether they should have been overseeing the shelves with the medications on them.

Issue: Where was the sale completed? Was it when the customer picked up the good at the shelf stocking drugs or was it when it was paid for at the till?

Logic: If displaying items on a shelf with a price it is an offer and the customer accepts by picking up the item and putting it in the basket this creates an impractical situation when they cannot then change their mind.

→ It follows that the customer picking up the item is an offer to purchase and the store accepts the offer by putting the transaction through.

→ Or that the store offers and the customer accepts by buying the item.

= Ultimately, the contract is formed at the cashier.

Result: makes the distinction between an offer and an 'invitation to treat'. The display of a product on a self-service basis can not amount to an offer. It is an 'invitation to treat', an indication of an offeree's (store's) willingness to negotiate a contract (a pre-offer).

Criticism: This case does not work for larger items at bigger stores.

Carlil v Carbolic Smoke Ball Company [1893] 1 QB 256

Facts: Carlil bought a smoke ball from a chemist and faithfully used it for over 8 weeks. She contracted influenza and sued the company to recover 100 Euro on the basis that their advertisement was a contract which promised that the smoke ball would prevent influenza and that the company would pay her 100 Euro if it did not work, saying that 1000 Euro had been deposited with a bank to show their sincerity.

Issue: Could Carlil's sickness be a breach of contract and is she then owed 100 Euro?

Logic:

The company made three points in defence. First, they argued the advert was mere "puff" and would have been considered so by the reasonable person. They also contended that an offer cannot be made to the whole world. Further, they argued that Carlil needed to communicate her acceptance of the offer to them.

Held: The court addressed each of their arguments separately.

- 1) First, the line in the advert that the company had deposited 1000 E in a bank to show sincerity was not mere "puff" but rather a promise.
- 2) The offer can be made to the whole world and issues of stocking and ridiculousness are ignored because anyone who performs the conditions in reliance of the promise accepts the offer it is therefore binding.
- 3) The offer was not 'nudum pactum' and there was consideration by Carlil. Any benefit or "inconvenience" suffered by the offeree at the request of the offeror is adequate consideration. So Carlil's use of the ball three times daily for 8 weeks is a sufficient inconvenience to be adequate consideration. The company's benefit of her sale was considered adequate benefit from the contract.

Key Questions:

1. Would the result have differed had Carlil caught the flu 6 months after using the smoke ball?

The idea is that Carlil would only be protected for the time of use.

2. What if Carbolic has not said that it had deposited 1000 E in the bank to show its sincerity?

Then there would be no incentive to believe and the reasonable person test may have shown a different result – as mere "puff".

3. Is it relevant whether 1000 E was in fact deposited?

No, all that is relevant is that it said so on the advert and that this was relied upon.

Auctions

The potential buyers make repeated offers and only one is finally accepted by the auctioneer at the elapse of the specific time. So at what point does the offer occur? How can we avoid ridiculous results like the sale of land for \$5000 in cases where they are selling without reserve?

There are potentially 2 contracts at play.

1. One between the buyer and seller which is the obvious one, but comes after the second one, which is the contract between the auctioneer and the buyer.
2. So the buyer can sue the auctioneer for breach of a separate contract.

Acceptance + Offer Must Correspond Completely

→ An Act in Pursuance of the offer prima facie establishes an acceptance of the offer

R v Clarke (1927) 40 CLR 227

Facts: Clarke gave information to the police about a crime to clear his name of that same offence which he has been the previous suspect in. Later he realised there was an award for anyone giving information on the crime. Is he entitled to the award even if he did not act in direct reliance of the offer?

Result: The unilateral contract is formed when a promisee acts in **direct reliance** of the offer made by the promisor otherwise it is not adequate consideration.

→ The acceptance must also be communicated to the offeror.

Carlill v Carbolic

Issue: Do unilateral contracts have to have notification of acceptance of offer?

Logic: Lindley J: the **inconvenience** suffered by performing the conditions of the advert for 8 weeks amounted to acceptance and consideration. Her actions accepted the offer, there was no need for a communication. Although her notification of her getting ill, which came via the claiming of the reward **letter**, could also have been deemed an acceptance of the offer.

Result: notification of acceptance rule can be waived for unilateral contracts

- Acceptance cannot be assumed in the form of silence, see Felthouse v Bindley.
- The increased use of standard contracts by businesses has led to a battle of the forms. They often contain very different clauses.

Butler Machine shows that the last set of contracts given without further negotiation are the terms upon which the contract can be enforced.

Butler Machine v Ex-Cell-O Corporation [1979] 1 All ER 965

Facts: In a business deal Butler was selling goods to Ex-Cell-O and included a price variation clause in B's contract, not E's. There was an offer, then a counter-offer, then the counter-offer was accepted because B detached the receipt from E and sent it back saying they accept the terms but that their terms remained the basis of this agreement. B sent E a bill for extra cost as per the terms of his contract. E refused.

Issue: This is a classic "battle of the forms" (L Denning). What happens when forms are exchanged and a single set of terms are not actually agreed?

Logic: In situations of back and forth forms "there is a contract as soon as the last of the forms is sent and received without objection being taken to it".

- If B sent the last form and A did not object, then B wins.
- If A sent the first form and B did not properly object, then A wins.

The fact that B thought they had preserved their rights was subjective intention. By tearing the receipt and signing they had agreed to the terms of E's form. Intention cannot override a signed document.

- Registered mail.
- It aims to protect the offeree against risk of delay or loss in the transmission of a letter and to stop the revocation of a letter after the acceptance has been posted

Revoking an Offer

Revocation must be before acceptance and it is not effective until the offeror communicates it to the offeree. The offeror just has to say they don't want to proceed.

Stevenson shows inquiries of other terms are not rejections of the offer.

Stevenson, Jacques & Co v Mclean

Facts: Seller offered to sell goods. Buyer telegraphed to ask if the seller would consider credit not cash. The seller treated this counteroffer as a rejection and sold the goods elsewhere. Before this was communicated to the buyer the buyer purported to accept the offer by telegram.

Issue: was the buyer's first telegram (asking for credit) a rejection, a counter-offer or merely a question?

Logic: The telegram was only a question and did not reject the terms. The two have to be of the "same mind" when the offer is accepted. But if the proposer changes his mind before the time arrives although no notice of the withdrawal has been given to the other party the option of accepting it is gone.

Lapse of Time

→ *An offer can lapse if the time has passed – this is not the same as revocation*

→ *When no time limit is given to the offer the offeree must accept it within a reasonable time*

Dickinson v Dodds

Facts: On 10 Jun Dodds offered to sell his house to Dickinson. Dickinson decided to accept on the 11 Jun but did not notify straight away. Later on the 11 Dickinson was informed by a 3rd party that Dodds had sold to someone else. Dickinson purported to accept the offer. Dodds said it was too late. Is revocation effective, or even needed, in a situation where a third party notifies one of the parties of a lapse of an offer that results in impossibility if completing the agreement?

Logic: Here, apparently no revocation is needed. All that is required is that the offeror convey to the offeree that they changed their mind about the offer. Dickinson knew Dodds was no longer prepared to sell before he accepted. Also, the promise to keep the offer open was not supported by consideration and not binding.

CERTAINTY AND COMPLETENESS

- **Uncertainty:** court may be unable to give the parties' language a sufficiently precise and clear meaning
- **Incompleteness:** if some important part of the transaction is un-agreed (or forgotten) it can't be filled with usual remedies of uncertainty. The contract will fail.
- Generally, contracts will be upheld where possible so it is likely the court will try its best to uphold the contract and fill gaps.

UNCERTAINTY

- Courts will try placing a reasonable meaning on the language – using industry standards and practices. Or through some other external standard
- Note that multiple meanings cannot make a contract void for uncertainty
- They will try context analysis to uncover intended meaning (factual matrix)
- Rise and Fall clauses: intended to take into account changing circumstances on costs and attempts to avoid uncertainty by making it really clear
- Sometimes arrangements can be too uncertain to be contractual

INCOMPLETENESS

- A contract will fail if an essential part is un-negotiated
- This can happen in some complex cases where parties seemingly overlook an important aspect to discuss
- Note that if they've decided one party's solicitors will deal with extra terms (reasonably) it is not incomplete
- The court may choose to imply terms into the agreement, especially price (if reasonable to do so).
- This is because the court wants to avoid the injustice of not upholding a contract one party has relied on
- Parties can't leave essential parts to future agreement. SO, one party can't keep discretion on whether or not to give consideration (illusory consideration)

Can the uncertain term be severed?

Upper Hunter shows that courts try to uphold contracts and will sever uncertain clauses if it is possible to avoid the whole contract becoming void.

Upper Hunter County District v Australian Chilling and Freezing (1968) 118 CLR 429

Facts: ACF entered a contract with UH to supply electricity to them. Clause 5 in the agreement said "if the supplier's costs shall vary in other respects than has been herein before provided the supplier shall have the right to vary the maximum demand charge and energy charge." HC sought to increase its charges but ACF alleged the clause was void for uncertainty placing reliance on the term "supplier's costs".

Issue: What is the difference between an uncertain term and an ambiguous term?

Logic: as long as a contract is capable of meaning it will be construed in that way. It is dependant on construction of contract. Courts will try to uphold promises and avoid finding an agreement void for uncertainty.

Test:

Result: Here there is no uncertainty but there is scope for disagreement over the terms of the agreement.